IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

CIVIL APPEAL 184 OF 2005

PIYUSH AMRITIAL HARIA.....1ST APPELLANT

MRS. NAINA PIYUSH HARIA.....2ND APPELLANT

P.A.H (Suing as next Friend

of his son A.P.H and his daughter S.P.H both minors**).....3RD APPELLANT**
ANIL HARIA.....4TH APPELLANT
SHARAD HARIA ……..…….. 5TH APPELLANT
MRS. SHANTABEN MOTICHAND SHAH ……..…….. 6TH APPELLANT
MRS. HARSH ASHOK SHAH ……..…….. 7TH APPELLANT
PIYUSH AMRITIAL HARIA ……..…….. 8TH APPELLANT
SHANTABEN MOTICHAND SHAH (as Legal Representative of the late MOTICHAND SHAH–Deceased**).....9TH APPELLANT**

AND

PANACHAND J. SHAH ……..……..…… RESPONDENT

(*Appeal from the Order/Decision of the High Court of Kenya at Eldoret (Gacheche, J) dated 23rd day of March, 2005*

In

H.C.C. C. No. 109 of 2004

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RULING OF OMOLO, J.A

on 28th September, 2004. The summons to set aside the judgment came up for hearing before Gacheche, J. on 28th October, 2004. Mr. Otieno, Advocate held Mr. Onyinkwa's brief for the respondent. Mr. Otieno made an oral application to be allowed to cross-examine the respondent and his secretary both of whom had sworn affidavits denying service as alleged by the process-server. The oral application to cross- examine the respondent and his secretary was opposed and was argued at some considerable length by Mr. Otieno and Mr. Wasuna. The learned Judge reserved her ruling on the issue and on 9th November, 2004, she ruled as follows:-

"I have taken into account the submissions of both very able counsels (sic) and it cannot escape my attention that the applicant and his secretary who have sworn the replying affidavits, deny that the process server appeared at their premises on 9/9/2004, as he alleges. The issues that they raise in their affidavits cannot just be wished away but the process server who is the only person who can controvert the said issues, has not filed a further affidavit in rebuttal. In the absence of his affidavit, the issues that the applicant and his secretary raise remain uncontroverted and in my humble opinion, I see no reason to allow the cross-examination of the two in a matter where there are no conflicting issues. I do in the circumstances dismiss the application with costs to the defendant/applicant."

This order was made in the presence of Mr. Onyinkwa who still appears for the appellants.

It is to be remembered that this order was made on an oral application to cross-examine and the oral application to cross-examine was itself an interlocutory application within the summons to set aside the ex-parte judgment already entered. The record does not show that Mr. Onyinkwa even made any application, oral or otherwise, for leave of the Judge to appeal against the order refusing cross–examination. More importantly no notice of appeal was lodged against the order. After the order was made, the summons to set aside the judgment was heard before the learned Judge on 8th December, 2004 and again on 9th February, 2005. The Judge reserved her ruling to the 23rd March, 2005 and on that date, the learned Judge allowed the summons asking for the setting aside of the judgment, and set aside the judgment as had been prayed in the summons.

On 4th April, 2005, the appellants lodged their notice of appeal and according to that notice:-

"--- the Plaintiffs/Respondents being dissatisfied with the decision of the Honourable LADY JUSTICE JEANNNE GACHECHE given at Elodret on 23rd day of March, 2005 intends' (sic) to appeal to the Court of Appeal for Kenya against the whole of the said decision."

The basis of Mr. Wasuna's objection, put simply is that there was no notice of appeal filed against the decision made by the Judge on 9th November, 2004 and as ground one purports to appeal against the decision of 9th November, 2004, that ground is inadmissible and in-competent. Mr. Onyinkwa's answer was that the two decisions are inseparable as they were made in the same chamber summons and there was no need to file separate notices of appeal.

Neither Mr. Wasuna nor Mr. Onyinkwa cited to the Court any authority for therespective positions they took over the matter. I start from first principles. Not all interlocutory orders are appealable as of right. For example in DELPHIS BANK LIMITED (NOW ORIENTAL COMMERCIAL BANK LIMITED) VS. CHANNAN SINGH CHATHE & FIVE OTHERS, Civil Appeal No. 180 of 2008 (unreported) the Court was dealing with two separate orders which were made on the same day though on different issues. At the end to whether leave to appeal had been granted in respect of the first order. The Court there remarked thus:-

"------. The order against which the aforesaid appeal had been lodged is interlocutory in nature. We have no doubt to (sic) our mind that it is one of those orders in which leave to appeal is necessary. The issue we need to consider is whether such leave was obtained."

In the matter under consideration the order of 9th November, 2004 arose out of an oral application within the chamber summons to set aside the ex-parte judgment and in my view, it required leave of the Judge or of this Court to enable the appellants to appeal against it. No such leave was sought and none has been obtained. On this basis alone, I would myself uphold the preliminary objection.

On the question of there being no notice of appeal against the decision of 9th November, 2004, surely it must be stretching the issue too far to say that the decisionof 9th November, 2004 was part and parcel of the decision of 23rd March, 2005. Those are clearly two separate decisions, and in my view each of them required a separate notice of appeal. It does not and did not mean that if a notice of appeal had been filed against the decision made on 9th November, 2004, everything would be held in abeyance until the appeal had been heard and determined. Having filed a notice of appeal against the decision of 9th November, 2004, the appellants would have been perfectly entitled to proceed with the hearing of the chamber summons itself, get the learned Judge's decision on the summons, file another notice of appeal and if and when the two appeals came up for hearing they would be consolidated and one decision given covering both of them.

In NAIROBI CITY COUNCIL VS. RESLEY [2002] 2 EA 493, the High Court had made two decisions, one on 11th March, 2002 and another one on 11th April, 2002. Nairobi City Council had filed a notice of appeal against the decision of 11th March, 2002, but that notice was thereafter withdrawn. Another notice of appeal against the orders made on 11th April, 2002 was also filed, but before that the Nairobi City Council had filed an application for stay in respect of the earlier orders made on 11th March, 2002, in respect of which the notice of appeal had been withdrawn. The Court had no difficulty in holding that:-

"---- any decision sought to be appealed against must be based on a notice of appeal filed against such decision. There is no provision for allowing a notice of appeal lodged in a later decision to be used in an application for stay of execution of an earlier decision."

It must reasonably follow, in my view, that there is no provision for allowing a notice of appeal filed against a later decision to be used as a basis for an appeal against an earlier decision. The notice of appeal in the present matter makes it abundantly clear that the appellants were only dissatisfied with the decision of the Judge made against them on 23rd unreasonable for the appellants to now say that because they were dissatisfied with the whole of the decision made on 23rd March, 2005, they must also be treated as having been dissatisfied with the whole of the decision made on 9th November, 2004, a decision which was made and concluded some four months before the decision of 23rd March, 2005. If they were dissatisfied with the decision of 9th November,2004, as well, they were obliged to evince their dissatisfaction by filing a notice of appeal against that decision. I have already pointed out that the proceedings in respect of the chamber summons would not necessarily ground to a halt because a notice of appeal had been so lodged. In my view, the preliminary objection must succeed on this point as well.

I would, accordingly, order that the appellants having failed to obtain leave either of the trial Judge or of this Court to appeal against the decision of 9th November, 2004 and there being no notice of appeal against that decision, ground one contained in the memorandum of appeal filed by the appellants is inadmissible and incompetent and I would order that that ground be struck out. I would further order that the costs occasioned by the preliminary objection shall abide the outcome of the appeal. As O'Kubasu, J.A agrees, those shall be the orders of the Court.

Dated and delivered at Eldoret this 23rd day of October, 2009.

R.S.C. OMOLO
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JUDGE OF APPEAL

RULING OF O'KUBASU, J.A

I have read the ruling prepared by Omolo, J.A. and agree with it and cannot usefully add anything.

Dated and delivered at ELDORET this 23rd day of October, 2009

E.O. O'KUBASU
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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.

RULING OF GITHINJI, J.A.

The nine appellants have appealed against the of decision the superior court (Gacheche J) dated 23rd March, 2005 allowing an application by the respondent herein to set aside the interlocutory judgment entered on 28th September, 2008. The application to set aside the interlocutory judgment was based on several grounds, the main one being that the plaint and the summons to enter appearance were never served on the respondent. At the hearing of that application, Mr. Otieno, learned counsel who held brief for Mr. Onyinkwa for the respondents made an oral application relying on **Order XVII Rule 2 (1)** of the *Civil Procedure Act* for leave to cross-examine the two deponents of the supporting affidavits regarding service. The oral application was opposed by Mr. Wasuna, learned counsel for the respondent in the application.

By a ruling dated 9th November, 2004, the superior court dismissed the oral application with costs. The application for setting aside the interlocutory judgment was subsequently heard and allowed on the merits. The appellants appealed against the substantive ruling of the superior court on five grounds. The first ground being:

"The learned Judge in the superior court erred in law and misdirected herself when she failed to allow the Defendant (Respondent) and his secretary to be cross-examined on their affidavit because the same were in conflict with the affidavit of the process server with regard to service".

The 2nd, 3rd and 4th grounds of appeal also relate to service of summons to enter appearance.

Before Mr. Onyinkwa, learned counsel for the appellants argued the appeal, Mr. Wasuna, learned counsel for the respondent objected to Mr. Onyinkwa arguing the first ground of appeal on the ground that the appellant did not file a notice of appeal against the ruling dismissing the oral application for leave to cross-examine the deponents of the supporting affidavit. On his part, Mr. Onyinkwa contended that the ruling was made in an oral application to set aside exparte

judgment; that it was not necessary to appeal against the ruling separately; that the ruling is part and parcel of the application and cannot stand in isolation; that the appellants decided to appeal against the whole decision and that the two rulings relate to the same thing.

Mr. Wasuna has not specifically applied for the striking out of the first ground of appeal. He merely raised an objection to the appellants proceeding with the first ground of appeal. It is apparent that Mr. Wasuna has not formally filed and served a notice of preliminary objection and by raising the objection on the hearing date he has no doubt taken the appellants' counsel by surprise.

Secondly, it is my view that the preliminary objection is incompetent for two reasons. Firstly, the Court of Appeal Rules do not provide for raising objection to appeals by a preliminary objection. Secondly, the respondent did not comply with the procedure prescribed by rules for making application to strike out an appeal under **Rules 80** of the Court of Appeal within the prescribed time or apply for leave at the hearing of the appeal under **Rule 101 (b)** to raise an objection to the competence of the appeal which he had failed to raise under **Rule 80**. The respondent if he considered the first ground of appeal as incompetent was perfectly entitled to apply under **Rule 80** for striking out that ground of appeal or alternatively seek leave at the hearing of the appeal to apply to have the impugned ground of appeal struck out.

On the merits for the objection to the first grounds of appeal, the application for leave to cross-examine the deponents of the supporting affidavit was specifically made under **Order V Rule 16** which allows the cross-examination of a serving officer and order **XVII Rule 2 (1)** *Civil Procedure Rule* which latter Rule provides:

"Upon any application, evidence may be given by affidavit, but court may at the instance of either party, order the attendance for cross-examination of the deponent".

The supporting affidavits the subject of the oral application in the superior court were filed in support of an application to set aside exparte judgment under **Order IX A Rule 10** *Civil Procedure Rules*. The order of the superior court appealed from is appealable as of right under **Order XLII** *Civil Procedure Rules*.

The oral application for leave to cross-examine was a procedural application made at the hearing of the substantive application to set aside the exparte judgment. The oral application was a means to an end but not an end in itself. Indeed, the dismissal of the oral application did not determine the real issue in controversy whether the respondent was served with the summons to enter appearance. That issue was decided by the ruling of 23rd April, 2005 which is appealed from. A notice of appeal would have been premature since the appellants would not have known that the application to set aside would ultimately be allowed. The objection has far reaching consequences both on the practice of the law and the business of the courts. If the objection is taken to its logical conclusion, then a party would be required to file a notice of appeal and ultimately file an appeal against any procedural order or ruling made in the course of the hearing of a substantive application otherwise he would be precluded from impugning the procedural decision and be deemed to have waived any right of means that two appeals should be filed one against the procedural decision and the other against the substantive application. This will result in the proliferation of appeals, increase the cost of litigation, cause delay in the conclusion of cases and clog the Court of Appeal.

In my respectful view, the application for leave to cross-examine deponents of the affidavits and the decision of court on the application thereof was an integral part of the application to set aside the exparte judgment. The examination was intended to investigate the issue of service and basis of the application to set aside was lack of service.

In the final analysis, I am satisfied that it is permissible for the appellants to file one appeal both against the procedure in the conduct of the application and against the decision on the merits. On my part I would dismiss the preliminary objection with costs to the appellants.

Dated and delivered at Eldoret this 23rd day of October, 2009

E. M. GITHINJI
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JUDGE OF APPEAL